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THE SPECIAL VERDICT—THEORY AND PRACTICE

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AT THE 1949 Conference of Federal Judges of the Ninth Circuit I discussed the special verdict, and my address was published in the *Washington Law Review*.¹ My treatment of the subject necessarily was largely theoretical as I had made very little use of the special verdict practice up to that time. Drawing upon abundant published material,² I assembled and summarized the common criticisms of the general verdict and the claimed advantages of the special verdict, and expressed the conclusion that the latter, as prescribed in Rule 49 of the Federal Civil Rules, was entitled to much more extensive use. Having sold myself on that proposition, it was inevitable that I should try it out in practice. I shall now endeavor to give the bench and bar a candid account of the results of my experiment. Before doing so, however, I think it would be helpful to discuss briefly the defects of the general verdict which it is so often said the special verdict should remedy or at least minimize.

Theoretically, as we tell our juries, it is the function of the judge to search out and declare the law, and the function of the jury to find the facts, and it is the jury's duty to accept and apply the law as announced in the court's instructions. Actually, however, the jurors may misunderstand or deliberately disregard the charge and return a verdict in accordance with their own ideas of what is right and just. If the verdict is a general one, that is to say, a verdict by which the jury merely decides the issues generally for the plaintiff or for the defendant, it is impossible to ascertain whether or not the jury followed the court's instructions. Since the jury has the power to disregard the instructions and the power cannot be controlled, it is indistinguishable, for all practical purposes, from a right to decide both issues of law and issues of fact.

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¹ 25 WASH. L. REV. 43.

² See, for example, Judge Frank's majority opinion in *Skidmore v. B. & O. R. Co.*, 167 F.(2d) 54 (C.C.A. 2nd 1948); Sunderland, *Verdicts, General and Special*, 29 YALE L. J. 253; Green, *A New Development of Jury Law*, 13 A.B.A.J. 715; Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L. J. 588; McCormick, *Jury Verdicts Upon Special Questions*, 2 F.R.D. 177.

No matter how many factual and legal questions may be involved in a lawsuit, the general verdict answers them all in three words—"for the plaintiff" or "for the defendant," and by what process the answer is arrived at is an insoluble mystery. But since it is assumed that the jury will understand and correctly apply to the facts the principles of law embodied in the court's charge, the court has the duty of fully and accurately instructing the jury as to the law. Failure to discharge that duty correctly, it has been said, is the greatest single source of reversible error.³ Appellate courts must assume that the jury has dutifully considered, has understood and has correctly applied the instructions and, therefore, that if the court's statement of the law is in any substantial particular incorrect, incomplete, or inaccurate, the general verdict has thereby been affected. The assumption, of course, is absurd. It is impossible in a few minutes to educate twelve laymen on the law of a case, embracing, as it often does, complex and technical rules of law, involved exceptions, and finely drawn legal distinctions. Many times in my experience the foreman of a jury has sent me a note by the bailiff asking some question which indicated that the jurors did not have even a vague conception of the meaning of the court's instructions.

When a special verdict is used, the jury is required to return a special written finding on each issue of fact presented. That is usually done by having the jury give "yes" or "no" answers to fact questions, or by having the jury make a selection from alternative written findings on each issue of fact. The jury is thereby relieved of the burden of understanding and applying the law, thus leaving to it the comparatively simple task of deciding issues of fact. The formulation of instructions is greatly simplified as the court need give only such explanatory directions as may be necessary to enable the jury to understand the legal terms employed and to make its findings upon the factual issues presented. The general verdict is an indivisible unit, and if it is bad in part it is bad as a whole and must be set aside. The special verdict, on the other hand, makes it possible to localize error, and the sound portions of the verdict may be saved. For example, if the jury has erred in assessing the amount of damages in a personal injury case but otherwise returned sound findings as to negligence and contributory negligence a new trial can be had on the sole issue of the amount of damages. Moreover, the special verdict tends to focus the attention of the jurors

³ GREEN, JUDGE AND JURY 351 (1930); see also ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 449 (1947) and Rossman, *The Judge-Jury Relationship in the State Courts*, 3 F.R.D. 98, 109.

on the issues of fact which they are called upon to decide and should give them a keener sense of responsibility and lessen the influence of emotion upon the verdict.

The comparatively few commentators who disparage the special verdict and defend the general verdict do not claim that juries actually understand and correctly apply the rules of law given to them in the court's instructions. Their argument is that by taking a broad lay view of the issues jurors add desirable flexibility in the application of involved and sometimes harsh rules of law to the facts of a particular case and thus dispense substantial common sense justice. As Professor Moore puts it in a footnote of his recent edition of the Federal Rules:

Nor do we believe that trial judges are well advised to take special verdicts in many jury cases. The notion that issues of "fact" are easily framed is unsound. And the jury is not, nor should it become, a scientific fact finding body. Its chief value is that it applies the "law," oftentimes a body of technical and refined theoretical principles and sometimes edged with harshness, in an earthy fashion that comports with "justice" as conceived by the masses, for whom after all the law is mainly meant to serve. The general verdict is the answer from the man in the street. . . .⁴

If Professor Moore and the others who subscribe to the views which he has expressed are correct, then our system of elaborate, technically accurate instructions to juries is a hypocritical farce. If the juror is to be regarded as on a level with the man in the street, there is no point in elevating the trial judge to the rarified atmosphere of a legal Mount Olympus. If the jury's true function is to dispense "earthy" justice, the court should be permitted to give it "earthy" instructions. The instructions should be on this order: Now, ladies and gentlemen, you have heard the evidence. You will retire to the jury room and return a verdict which you think is right and just.

I turn now to my own experience with the special verdict. During the last fiscal year, that is to say, from July 1, 1949 to June 30, 1950, I presided in the trial of nine jury cases in which a special verdict could have been submitted. (The figure does not include jury cases tried by my colleague, Judge Lloyd L. Black,⁵ nor jury condemnation cases,⁶ which just about equal in number all other jury cases in the district.) In one of the nine cases a verdict was directed. In two others general

⁴ MOORE'S FEDERAL RULES (1949), Footnote to Rule 49, Sec. 0.05, p. 1148. See also 2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 737 (Rules Ed.).

⁵ Died August 23, 1950.

⁶ In the trial of such cases the special verdict practice prescribed by Rule 49(a) is not available since condemnation cases are governed by the Federal Civil Rules as to appeals but not otherwise. See Rule 81(7).

verdicts were returned. In the remaining six cases special verdicts were used. During the period under consideration it was my practice to submit special verdicts in all cases coming under Rule 49(a), except where one or both of the parties objected and succeeded in convincing me that in the circumstances of the particular case a general verdict was preferable. I am aware that my experience with the special verdict has been very limited, both as to time and number of cases involved, but with that in mind I do not hesitate to say that on the whole I regard the results as satisfactory. With one exception, special fact findings of the jury have been consistent. I have not been obliged to set aside any special verdict or grant a new trial. There has been no appeal in any of the six cases. With the one exception mentioned above the result in each case, in my judgment, has been in accordance with law and the weight of the evidence, and in the commonly understood sense, fair and just.

So much for the credit side. On the other hand I have found that the special verdict has definite disadvantages and in some cases raises serious difficulties. Juries seem to have more trouble reaching an agreement on special verdicts. Most of them were obliged to deliberate for twelve hours or longer. The difficulty of agreement is understandable. As we all know, jury verdicts often represent compromises, and it is not so easy to reach separate compromise agreements on several fact findings of a special verdict as it is to agree on one all-inclusive general verdict. I have reason to believe also that while many jurors will complacently acquiesce in a general verdict they are much more hesitant about subscribing to a special verdict fact finding which they think is not supported by the evidence.

In several instances when the foreman sent word to me by the bailiff that the jurors could not agree and should be discharged, I had them brought in and in open court talked to them in an effort to persuade them to reach an agreement. I pointed out that jury trials are expensive for the litigants and for the government, that if the case had to be tried again it would, in all probability, be presented to another jury on substantially the same evidence and that it would be no easier for the future jury to agree than for the instant one. I qualified my remarks by saying that no juror should sacrifice his settled convictions as to how the issues should be decided merely for the sake of arriving at a verdict, and I tried to avoid saying anything that might inferentially favor one

side or the other.⁷ I then sent the jury out for further deliberation. I was not obliged to discharge the jury in any case because of disagreement, however, and it was not necessary to keep a jury in deliberation for longer than thirty hours.

Another practical difficulty I find arises from lack of familiarity of the lawyers with special verdict procedure. Lawyers are accustomed to framing their requested instructions on the basis of general verdicts, and so far I have not been very successful in my efforts to induce them to change their methods to meet special verdict requirements. I announce at the outset of the trial that I propose to submit a special verdict, and in some instances such announcement is made at the pre-trial conference a week or more in advance of the trial, but nevertheless the proposed instructions usually come in geared to the general verdict.

In a case where there are numerous complex issues it is difficult to formulate a satisfactory special verdict either in the form of fact questions or fact findings. In such a case the preparation of a large number of fact findings is burdensome to the court and consideration of them is likely to be confusing to the jury. It is sometimes possible to frame the special verdict in such a way as to combine several detailed issues of fact in one or two general, ultimate fact findings. However, if the findings are broad and general, the result is that the court's instructions to the jury must be almost as extensive and elaborate as they would be for a general verdict.⁸ For example, let us suppose that a special verdict is to be submitted in an action for damages for personal injuries. The plaintiff contends that the defendant was negligent in seven separate particulars and there is some substantial evidence to support each of them. The defendant claims that the plaintiff was contributorily negligent in five particulars and the claims are likewise sufficiently supported to take them to the jury. The jury could be directed to find whether or not the party having the burden of proof has established the facts on which each claim of negligence or contributory negligence is based, but that would necessitate the submission of at least twelve separate fact questions or fact findings to the jury and the special verdict would be cumbersome and confusing. The other alternative is to ask the jury to find generally whether or not the defendant was guilty of any of the claimed acts of negligence and whether the plaintiff was guilty of any of the alleged acts of contributory negligence.

⁷ During the period under consideration neither side took any exception to the court's remarks.

⁸ There is also the danger that an appellate court will regard the special verdict as calling for conclusions of law rather than findings of ultimate facts.

If such general findings are submitted, however, it is necessary for the court to fully instruct the jury as to what constitutes negligence and contributory negligence with reference to the various contentions of the parties.

In those cases where the issues are numerous or complex, if the special verdict is to be employed at all, it seems to me that it should be used in connection with pretrial conference procedure. By pretrial in many cases the factual issues can be reduced in number and simplified and clarified so as to make it practicable to embody them in special verdict findings.

Special verdict practice in federal court cases, as I have stated, is governed by Rule 49(a) of the Federal Civil Rules.⁹ The state courts of Washington have no comparable rule, but there is statutory authority for the special verdict in Sections 362 and 364 of Remington's Revised Statutes. Those statutes are very old, however, dating back to the territorial laws of 1854 and are essentially declaratory of the common law. The common law special verdict is of very ancient origin, but it has not been used to any great extent principally because of the danger of inadvertently omitting submission of some issue of fact to the jury, thus undermining the verdict.¹⁰ Rule 49(a) has remedied that infirmity by its provision that if the court fails to submit to the jury any issue of fact each party shall be deemed to have waived his right to trial by jury on that issue, and the court may make a finding thereon unless demand for submission is made by one of the parties before the case is sent to the jury. And even if the court fails to make a finding on an omitted issue of fact it will be deemed to have made a finding in accord with the judgment on the special verdict. If the special verdict is to be extensively employed in the state courts of Washington it seems to me that a state rule comparable to federal Rule 49(a) should be adopted. It should provide similar safeguards, and there may be special problems raised by differences between federal and state practices which it should cover.¹¹ The state already has the basis for pretrial

⁹ The special verdict provided for in Rule 49(a) should not be confused with the provision in 49(b) for submission to the jury *along with the general verdict* of written interrogatories upon one or more essential issues of fact.

¹⁰ See 2 BARRON AND HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE*, 735, Sec. 1051; 3 MOORE'S *FEDERAL PRACTICE* 3097, Sec. 49.01.

¹¹ For example, the Washington state practice of allowing a majority of ten of the twelve jurors to agree upon a verdict in a civil action. The Washington Supreme Court has held that when the jury is polled at least ten of the jurors must declare a special verdict to be their verdict and that a juror who has taken inconsistent positions, on two different interrogatories or findings of the verdict, may not be counted as one of the ten. *Devoni v. Dept. of Labor and Industries*, 136 Wash. Dec. 202 (1950).

See note on the *Devon* case, this volume, p. 56.—ED.

procedure, in Rule of Practice 18, set out in 18 Wash.(2d) page 44-a.¹² It is substantially identical with the federal pretrial rule.¹³

It is my conclusion that judicious use of the special verdict will improve the administration of justice in civil jury trials and that it should be submitted in all cases in which it is practicable to do so, that is to say, in cases where the factual issues are not too numerous or complex. And its use can be extended if it is used in connection with pretrial conference by which the issues are narrowed and simplified. I think that it offers a fairer, more realistic approach to the determination of civil controversies by jury trial than the general verdict and that with the special verdict the final result of the lawsuit is more likely to be in accord with the law and the weight of the evidence.

Editor's Note: The Washington Supreme Court adopted the Federal Rule on Special Verdicts and Interrogatories, effective January 2, 1951, thus making it too late to revise Judge Driver's article. The new rule is Rule 43, 34A Wn. (2d) 107.

¹² This is now Rule 16, 34A Wn. (2d) 80.—Ed.

¹³ Civil Rule 16.